United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

Original

76-5026

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-5026

B

P/S

In the Matter

of

BANQUE DE FINANCEMENT, S.A.,
Debtor.

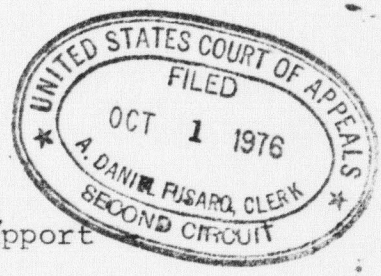
BANQUE DE FINANCEMENT, S.A.,
Appellant,

FIRST NATIONAL BANK OF BOSTON,

and

CHASE MANHATTAN BANK, N.A.,
Appellees,

FIRESTONE TIRE & RUBBER COMPANY,
Intervenor in support
of Appellant.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE FIRESTONE TIRE & RUBBER COMPANY, INTERVENOR IN SUPPORT OF APPELLANT

CLEARY, GOTTLIEB, STEEN & HAMILTON
Attorneys for Firestone Tire &
Rubber Company
One State Street Plaza
New York, New York 10004

Of Counsel,

JAMES C. BLAIR

344-0600
Ext. 250

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Docket No. 76-5026

In the Matter of

BANQUE DE FINANCEMENT, S.A.,

Debtor-Appellant

BRIEF OF THE FIRESTONE TIRE & RUBBER COMPANY, INTERVENOR IN SUPPORT OF APPELLANT

This brief is filed on behalf of The Firestone Tire & Rubber Company ("Firestone"), an Ohio corporation, in support of the position of appellant, Banque de Financement ("Finabank"). Firestone is one of the largest general creditors of Finabank. By order of the court, on consent, dated September 28, 1976, Firestone was substituted for its wholly-owned subsidiary, Bank Firestone, Ltd., which has recently been liquidated into its parent and dissolved, and its designation on this appeal was changed from appellee to intervenor in support of appellant in order better to describe its position on this appeal.

The indebtedness of Finabank to Firestone arose out of a foreign exchange contract between Finabank and Bank

Firestone, Ltd., which was a Swiss bank corporation (at all times wholly-owned by Firestone). This foreign exchange contract was of the same character as those giving rise to the claims of the attaching banks (movants below and appellees here). Bank Firestone, Ltd. appeared below both before the Bankruptcy Court and District Court in opposition to the motion to dismiss Finabank's Chapter XI petition, and argued orally and filed briefs in both courts. As counsel for Bank Firestone, Ltd. advised the courts below, dismissing Finabank's petition and thereby allowing the preferential attachments of appellees to stand will reduce the estate of Finabank available for general creditors to an extent that Firestone's pro-rata share of those assets may be reduced by as much as $600,000.

Issues Presented

Firestone adopts the statement of the Issues Presented in appellant Finabank's brief.

Statutes Involved

This case involves the Bankruptcy Act, 11 U.S.C. §1, et seq., and the Bankruptcy Rules. Specifically §§ 2(a)(22) and 376 of the Act and Rules 119, 11-17 and 11-42 are directly involved. They are set forth in full in appellant Finabank's brief.

Statement of the Case

Firestone adopts the Statement of Case in appellant Finabank's brief.

ARGUMENT

Both courts below seemed to advance essentially four grounds justifying dismissal of Finabank's Chapter XI petition: (1) that it was filed in bad faith because Finabank was not genuinely seeking a rehabilitation as contemplated by Chapter XI; (2) that it was filed in bad faith because Finabank knew that Swiss bank secrecy laws precluded disclosure of the name of its depositors and, hence, precluded compliance with Chapter XI; (3) that, under §2a(22) of the Bankruptcy Act and Rule 119 of the Bankruptcy Rules, dismissal would be in the best interests of "local" creditors; and (4) that Finabank had repeatedly defaulted in filing a plan and otherwise subsequent to the date of filing its Chapter XI petition. This brief deals with these four grounds and makes these points:

First, Finabank was seeking rehabilitation in good faith when it filed in Chapter XI and any finding to the contrary below was wholly arbitrary and without even a shred of support in the record.

Second, Notwithstanding the restrictions of Swiss bank secrecy, a Chapter XI arrangement by Finabank

was entirely feasible under the flexible approaches authorized and intended by §2a(22) of the Bankruptcy Act and Rule 119 of the Bankruptcy Rules.

Third, the dismissal under §2a(22) and Rule 119 in the interests of "local," i.e. American, creditors is a clear misapplication of the Bankruptcy Act in general, and §2a(22) and Rule 119 in particular, which contemplate that (i) there will be no discrimination whatever in favor of "American" creditors and (ii) a Bankruptcy Court is not to exercise its discretionary power to dismiss under § 2a(22) and Rule 119 when the result is to allow preferential attachments to stand, and

Fourth, defaults by a petitioning debtor subsequent to filing of a Chapter XI petition are a basis for dismissal only under and pursuant to § 376 of the Act and Rule 11-42 of the Rules, which require (i) a hearing after notice and (ii) a finding -- based on evidence -- that the dismissal would be in the "best interests" of all creditors and of the debtor; here, no such hearing was held, no such finding was made, and no facts that would justify such finding exist in the record.

POINT I

There Was No Evidence Whatever To Justify A Finding That The Petition of Finabank Under Chapter XI Was Not Filed in Good Faith With A View To Rehabilitation

On May 5, 1975, when Finabank filed its peition under Chapter XI, it was actively seeking relief under applicable Swiss law to achieve a rehabilitation very similar in character to a Chapter XI arrangement under American law. (A 72) The record is clear and undisputed on this. The Chapter XI petition filed here was filed in aid of the Swiss proceeding for the purpose of preserving a substantial portion of Finabank's assets from preferential attachments by two American banks and to permit those assets to be included in any rehabilitation arrangement effected in the Swiss proceeding.*

In January, 1976, Finabank had applied to the Swiss court for a moratorium ("sursis bancaire") under a

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* A separate interpleader suit is pending in the District Court to determine whether the major portion of those assets were in fact trust assets and, hence, not includible in Finabank's estate in any event. Both the principal movant, one of the attaching banks, and Firestone are opposing the trust claims and the positions of all parties on the matter of dismissal of the Chapter XI petition are necessarily predicated on the assumption that at least a major part of the assets are beneficially owned by Finabank and, hence, either subject to attachment for a debt of Finabank or includible in Finabank's estate.

statute that contemplated the appointment by the Swiss court of a provisional commissioner to review the affairs of Finabank and determine, during the interlocutory moratorium period, whether rehabilitation was feasible. (A 4, 83)* If the finding of the commissioner is that the debtor will not be able to pay its debts in full on time at the end of the moratorium period, or has liabilities in excess of assets, or will be unable to achieve an out-of-court reorganization, the commissioner is to require the opening of bankruptcy proceedings unless the bank petitions for an arrangement.** Pursuant to Finabank's application, the Swiss court appointed Fides Societe Fiduciare as provisional commissioner. (A 4, 83). On May 5, 1975 Fides was still so acting (A 58) and, presumably was conducting the required review of Finabank's affairs. Admittedly this Swiss proceeding is not precisely the same as any provided in American law. But American law does not require such precision in the international bankruptcy situation. Similarity on basic aspects is enough. In re Neidecker, 82 F.2d 263 (2d Cir. 1936).

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* Section XII, Articles 29, 30, 31 of the Swiss Federal Banking Act is the applicable statute. (A 72) Specific statements of the contents of that Act are based on an English translation published by the Union Bank of Switzerland in 1972.

** Section XII, Article 35 of the Swiss Federal Banking Act.

The Bankruptcy Act, in §2a(1), does expressly contemplate that an American bankruptcy proceeding is appropriate to administer American-situs assets of a non-American insolvent. As Bankruptcy Rule 119 indicates, one circumstance in which such a proceeding is contemplated is where a proceeding to rehabilitate the estate of the non-American bankrupt has been filed in a foreign court. And since Rule 11-17, specifically applicable to a Chapter XI proceeding, incorporates Rule 119 into the Chapter XI Rules, the American Act clearly contemplates that the American proceeding may be a Chapter XI proceeding.

It would be captious in the highest degree to suggest that Finabank, on May 5, 1975, should have filed under some other chapter of the Bankruptcy Act. The Bankruptcy Act presented three alternative choices: (1) a straight bankruptcy, (2) a Chapter X proceeding, or (3) a Chapter XI proceeding. For Finabank to have filed for straight bankruptcy would have been directly contrary to what at the time was being sought in the Swiss proceeding, i.e., a rehabilitation. The Chapter X proceeding would have been equally inappropriate because the relief sought in the Swiss proceeding did not contemplate an arrangement among the equity holders. Chapter XI, on the other hand,

contemplates rehabilitation either by a composition with unsecured creditors or by pure moratorium. This is demonstrated by § 306 of the Act, which includes in the definition of a "plan" contemplated by Chapter XI the "extension of the time of payment of [the debtor's] unsecured debts . . . ." That is precisely what Finabank was seeking at the time in Switzerland under Swiss law and the feasibility of which was exactly what Fides was in the process of evaluating under Swiss law.

In short, on May 5, 1975, Finabank's choices were limited to (i) filing here under Chapter XI, or (ii) filing here for relief inconsistent with the relief being sought in the then pending Swiss proceeding, or (iii) suffering the substantial portion of its assets with an American situs to be lost to it and its creditors by reason of patently preferential attachments made in anticipation of, and following, the commencement of the Swiss proceeding. If the Bankruptcy Judge and District Judge below meant in their opinions to suggest that, somehow, the proceeding should not have been filed under Chapter XI, they have adopted a "let them eat cake" position. Finabank had no other appropriate choice on May 5, 1975.

Further, Finabank waited as long as it could to file the American proceeding. Had it waited any longer, the four months' preference period for setting aside the American attachments would have expired. (A 92)* But at that time the investigation of its affairs by the provisional commissioner, as required under Swiss law, had not been completed and, hence, it was still unclear whether a rehabilitation plan under Swiss law would be permitted. While the opinions of both of the Courts below point to subsequent statements by Finabank counsel, 1-1/2 or more months later, reflecting an increasingly pessimistic view on the feasibility of rehabilitation (A 226-27, A 279), these reflected the situation as the investigation proceeded after the Chapter XI petition was filed on May 5, 1975.** They in no way suggest that, at the time the American proceeding was filed, it was filed in bad faith or without a

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* First National Bank of Boston attached on January 20, 1975 and Chase Manhattan Bank on January 7. (A 92) In fact, the order of attachment in favor of Chase Manhattan Bank had been served, without levy, on January 5, 1975.

** In fact, on June 23, 1975, Finabank filed for a formal moratorium that contemplated its winding-up on the ground of insolvency. (A 49, 71-72).

bona fide hope of rehabilitation. Indeed, a finding that there was no such bona fide purpose in filing the American proceeding cannot be justified in view of the fact that the provisional commissioner appointed by the Swiss court was still engaged in making its investigation as to whether rehabilitation was feasible. It is respectfully submitted that any suggestions in the opinions below of bad faith on the part of Finabank and the Swiss court-appointed commissioner (which verified the petition - A 6) in filing the Chapter XI petition cannot be supported on any basis whatever in the record.*

Even when an American files a Chapter XI proceeding, it is often filed only in the hope that an arrangement can be achieved. A debtor is not required to wait for certainty while his assets are dissipated by preferential attachments. Mere lack of clear hopelessness

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* No evidentiary hearing was held below and, hence, no question of credibility existed. Accordingly, the "clearly erroneous" test of Bankruptcy Rule 810 (which the Advisory Committee Note to the Rule states to be an adoption of the standard of Rule 52(a) of the Federal Rules of Civil Procedure) does not preclude full consideration on this appeal of the fact findings of the Bankruptcy Judge. See, Dopp v. Franklin National Bank, 461 F.2d 873, 878-79 (2d Cir. 1972).

is enough.* And the Bankruptcy Act does not contemplate that, if the debtor's hope does not materialize, the proceeding will simply be dismissed, allowing preferences

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* The Bankruptcy Judge in the instant case, at an early stage, expressed the view that, under the Bankruptcy Act, "good faith" in filing the petition was not even open for his consideration. (A 141) Cf., Sumida v. Yumen, 409 F.2d 654, 659 (9th Cir. 1969), subsequent appeal 444 F.2d 1281 (1971), cert. denied, 405 U.S. 964 (1972).

One of the leading firms of the bankruptcy bar, Messrs. Levin & Weintraub, express the view that a Chapter XI petition is appropriate unless there is no possibility of a plan being ultimately proposed and confirmed. See Levin & Weintraub, Practical Guide To Chapter XI of the Bankruptcy Act 16 (N.Y. Credit & Finan. Mgt. Ass'n 1975):

> "Chapter XI, unlike Chapter X, has no specific provisions requiring an initial showing by the debtor that his petition has been filed in good faith."
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> "This does not mean that the question of good faith should be ignored in a Chapter XI proceeding. The committee or the attorney for any creditor may examine a debtor and witnesses, if need be, to ascertain whether there is any possibility of a plan being ultimately proposed and confirmed. If the picture is hopeless, all necessary safeguards may be instituted and all remedies available to creditors may be asserted, to restrict the operations of a debtor in possession, to have the concern adjudicated a bankrupt, and have the standby trustee qualify for the purpose of conducting an immediate liquidation at the earliest possible moment." (Emphasis added).

and preferential attachments to stand. Rather, in such circumstances, the Act contains specific provisions in §376 to deal with that situation. As we discuss in Point IV below, §376 would not justify the dismissal of Finabank's petition here.

Both courts below relied on Ira Haupt & Co. v. Klebanow, 348 F.2d 907 (2d Cir. 1965) as justifying dismissal on the basis of lack of likelihood of rehabilitation (A 229, 230). Both courts ignored the essential element in Ira Haupt. The statement in the opinion of the Bankruptcy Judge below suggesting that Ira Haupt involved an "exercise of . . . discretion in terminating the debtor's relationship with the Bankruptcy Act. . . ." (A 229) reflects a complete misconception of what Ira Haupt did. Ira Haupt was a case where the debtor filed a Chapter XI petition in a pending involuntary bankruptcy proceeding, thereby seeking halt and pre-empt the involuntary proceeding. As this Court recognized in its opinion in that case, the decision was that the ordinary bankruptcy was more appropriate. By reason of § 376 of the Act, the dismissal there resulted in an automatic adjudication of bankruptcy without any discretion whatever on the part of the court. In Ira Haupt, there was not a termination of the debtor's relationship with the Bankruptcy Act and the dismissal did not result in any creditor being allowed to retain a preference or preferential transfer that he otherwise

could not have retained. And it is noteworthy that even the dismissal in Ira Haupt was based on there being "no prospect of rehabilitation." This necessarily meant "no prospect" at the time of filing because subsequent lack of prospect is covered by § 376 and Rule 11-42.*

In summary, the Bankruptcy Act, including specifically Rule 119, contemplates that an American proceeding is appropriate to administer American assets of a non-domiciliary debtor. And it contemplates that a Chapter XI American proceeding is proper in such circumstances where the essence of the relief sought in the debtor's domicile is an arrangement with creditors with a view to rehabilitation of the debtor. That is precisely the relief Finabank was seeking in the proceedings in its domicile, Switzerland. That such a rehabilitation was not a certainty but only a bona fide hope is no more ground for dismissing the Chapter XI proceeding in this case than it is for dismissing a

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* In SEC v. United States Realty & Improvement Co., 310 U.S. 434 (1940), the Supreme Court dismissed outright a Chapter XI petition because Chapter X was the appropriate proceeding in the circumstances. Congress thereafter amended § 328 of the Act to authorize the transfer from Chapter XI to Chapter X without a dismissal, thus indicating a clear effort to avoid the results of an outright dismissal (which permits preferences to stand) by reason of an inappropriate choice by the debtor of the Chapter under which relief is sought.

Chapter XI proceeding filed by an American. No finding of bad faith can possibly be justified on the record. The subsequent conclusion by Finabank or the Swiss court-appointed commissioner that rehabilitation was probably not feasible supplies no justification for a hindsight finding of bad faith on May 5, 1975.

POINT II

Notwithstanding the Restrictions Imposed by Swiss Bank Secrecy Laws, An American Chapter XI Proceeding To Deal With The American Situs Assets Was Entirely Feasible Under The Bankruptcy Act In the Circumstances

Central to the conclusions of the Courts below -- and probably decisive -- is the fact that, by reason of Swiss bank secrecy laws, Finabank could not reveal the names of its depositors without their permission. From this, both courts below concluded -- and correctly concluded -- that a standard, garden-variety American Chapter XI proceeding was not possible, and that Finabank knew this from the outset. This may be the basis upon which the courts below concluded that the petition here was filed in bad faith, i.e., that Finabank knew at the time of filing that it could not meet the requirements of Chapter XI that it supply the names of its creditors. This inability of Finabank would apply with equal force whether Finabank

had filed for straight bankruptcy or had filed under Chapter X.* Hence, if this ground be valid, the vice leading to dismissal of the Chapter XI petition was not Finabank's choice of a Chapter XI proceeding; the same vice would apply to any voluntary proceeding by Finabank under the Bankruptcy Act, and even to an involvuntary one if there is jurisdiction over Finabank or if Finabank appears. This would mean that the American bankruptcy courts are closed to foreign banks subject to secrecy laws in their domicile (a situation not confined to Switzerland**) in the case of a voluntary petition and are perhaps closed to their creditors in the case of an involuntary petition if the bank is subject to American jurisdiction (and many do business in the United States). This would, in such circumstances, result in inequality in treatment of creditors and what this court has characterized

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* Section 7 of the Act requires the bankrupt to file a list of creditors for a straight bankruptcy, whether voluntary or involuntary.

** See United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968), especially at pp. 901-902.

as a "race of diligence" to attach -- a result that should be avoided where feasible. See Israel-British Bank (London) Ltd. v. FDIC, 536 F.2d 509 (2d Cir. 1976).

The Supreme Court, in another context, has indicated that prohibitions of disclosure by reason of Swiss bank secrecy are not to be viewed by our courts as inherently evil but are to be tolerated and accommodated to the full extent feasible consistent with equity where the alternative is a forfeiture of property (i.e., in this case, the taking assets to which general creditors are otherwise entitled and allowing their retention by preferential attachers). Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958). That case indicates that our courts are not to approach the matter of Swiss bank secrecy with a punitive attitude and are to consider whether alternatives exist that will result in no one being deprived of substantial rights. This is particularly applicable here where those seeking to retain preferences by relying on such secrecy are sophisticated international banks whose claims arise out of contracts entered into in Europe with a Swiss bank and with full knowledge of Swiss bank secrecy.

And the fact is that, notwithstanding Swiss bank secrecy, a Chapter XI proceeding of the character contemplated by the Bankruptcy Act in the circumstances is

entirely feasible and appropriate in this case. The way is indicated by the letter, the spirit and the history of §2a(22) of the Act, and its implementing Rule 119 (incorporated in the Chapter XI Rules by Rule 11-17). Where a foreign proceeding for rehabilitation of the debtor is pending, §2a(22) and Rule 119 authorize the bankruptcy court either (i) to take jurisdiction and proceed fully with the American proceeding, or (ii) to take jurisdiction and apply some provisions of the Act and thereafter suspend the American proceeding and permit the assets to be administered in the domiciliary proceeding, or (iii) to dismiss the American proceeding outright. This choice is required to be made "having regard to the rights or convenience of local creditors and to all other relevant circumstances." Both courts below treated §2a(22) and Rule 119 as if their words were written on a clean slate devoid of evidence of underlying purpose. But §2a(22) and Rule 119 were not written on a clean slate. The accepted originator and advocate of the proposal that was adopted by Congress in 1962 as §2a(22) is Dr. Kurt Hans Nadelmann. For over 30 years, both before and after enactment of §2a(22), he has written extensively on why that provision was needed, what it is intended to accomplish, and what its enactment did accomplish. He is not simply an authority on the subject -- he is the authority and leading

expert on §2a(22) and Rule 119.* These writings of Dr. Nadelmann (as well as writings by others) supply the most powerful character of authority as to the underlying intention of the words that appear in §2a(22) and Rule 119. To interpret them without taking account of these writings is to read them in a vacuum and in violation of the principle calling for consideration of their purpose and spirit.** The writings of Dr. Nadelmann make several clear points:

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* As to Dr. Nadelmann's being the originator of § 2a(22) see the comment of Professor Kennedy (recently Executive Director of the Commission on Bankruptcy Laws) in Kennedy, Bankruptcy Legislation of 1962, 4 B.C. Ind. & Com. L. Rev. 241, 247 n.31 (1963). As to his being the authority on Rule 119, see citation in the Advisory Committee's Note to Rule 119. See also the citations to Dr. Nadelmann as the authority on this subject in the Note of the Commission on Bankruptcy Laws of the United States to § 4-103 of the proposed new Bankruptcy Act. Report of the Commission on Bankruptcy Laws of the United States, Part II, pp. 70-71. (H.R. Doc. No. 93-137, Part II, 93d Cong., 1st Sess. 1973). The House Report to the 1952 amendments to the Bankruptcy Act specifically referred to an article by Professor Nadelmann for an amendment to § 70a of the Act involving the international bankruptcy situation. H.R. Rep. No. 2320, U.S. Code Cong. & Adm. News, 82d Cong. 2d Sess., 1960, 1976 (1952). He is also given credit for the amendment to §65d at the same time. Kennedy, supra. For a biographical sketch of Dr. Nadelmann and description and discussion of his extensive writings in the area of international and interstate conflict of laws relating to bankruptcies see Conflict of Laws : International and Interstate, Selected Essays by Kurt H. Nadelmann (Martinus Nijhoff, The Hague, 1972). This volume was published by Dr. Nadelmann's colleagues at the Harvard Law School as a tribute to him and in appreciation and recognition of the significance of his writings and contributions to learning.

** See United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 839 (1975); Israel-British Bank (London) Ltd. v. FDIC, 536 F.2d 509, 512 (2d Cir. 1976); In re Kokoszka, 479 F.2d 990, 997 (2d Cir. 1973); aff'd. Kokoszka v. Belford, 417 U.S. 642 (1974); Haberman v. Finch, 418 F.2d 664, 666 (2d Cir. 1969).

First, the purpose of §2a(22) and Rule 119 is to enable the American proceeding to be dismissed or suspended in favor of the foreign proceeding in order to avoid duplicate administration of a bankrupt's estate where it would be wasteful of time and expense* but only provided it is utilized in a manner that will not result in permitting preferential attachments of the American assets to stand. If there have been local preferential attachments of the American assets, an American bankrutpcy proceeding is entirely proper for the purpose of preserving those assets for the estate by setting aside those attachments, even if that is the sole purpose of the American proceeding. In fact, in those circumstances, §2a(22) and Rule 119 were not intended to afford the bankruptcy court discretion to dismiss the American proceeding. As Dr. Nadelmann stated in his seminal article (cited in the Advisory Committee Note to Rule 119), The National Bankruptcy Act and the Conflict of Laws, 59 Harv. L. Rev. 1025, 1046 (1946):

> "When local assets are attached after bankruptcy has been declared abroad and the foreign trustee is not permitted to collect the assets because of the attachment, a local bankruptcy adjudication becomes indispensable to secure equal distribution of the attached assets among all creditors. No room is left for the exercise of discretion by the bankruptcy court in favor of the foreign proceeding."

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* See Nadelmann, The National Bankruptcy Act and the Conflict of Laws, 59 Harv. L. Rev. 1025, 1044, 1046 (1946); Nadelmann, Assumption of Bankruptcy Jurisdiction Over Non-Residents, 41 Tul. L. Rev. 75, 77-78 (1966); Kennedy, Bankruptcy Legislation of 1962, 4 B.C. Ind. & Com. L. Rev. 241, 247-48 n.32 (1963); McLaughlin, Book Review, 50 Harv. L. Rev. 379, 379-80 (1936).

And following enactment of § 2a(22), Dr. Nadelmann observed in The American Bankruptcy Act and Conflicting Administrations 12 Int'l & Comp. L.Q. 684, 685 (1963):

> "The aim of the new legislation is to enable the court to dispense with local administration, or some aspects of it, if it appears that a local administration is neither necessary nor desirable. * * * "
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> "* * *An adjudication abroad is no obstacle to assumption of jurisdiction. Concurrent administrations thus are a possibility. The availability of power not to exercise jurisdiction, or to suspend the exercise, therefore is of practical interest. An adjudication in the United States may be indicated to protect the interests of the creditors. If preferences were obtained, by attachment or otherwise, it may be the only means to secure the equal distribution of the local assets among all creditors. On the other hand, a local adjudication and administration may serve no useful purpose in the individual case." (Footnote omitted)

See, also, Nadelmann, Revision of Conflicts Provisions In The American Bankruptcy Act, 1 Int'l & Comp. L.Q. 484, 489-90 (1952)

The Note of the Bankruptcy Commission to the similar provision in the proposed new Act adopts the same approach.* See

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* Note of the Commission on Bankruptcy Laws of the United States to § 4-103 of the proposed new Bankruptcy Act in Part II of the Report of the Commission on Bankruptcy Laws of the United States (H.R. Doc. No. 93-137, Part II, 93d Cong. 1st Sess. 1973 at p. 71):

> "If it is necessary, however, to avoid a transfer that occurred before relief is sought pursuant to this section, the foreign trustee or an eligible creditor will ordinarily be well advised to file a petition pursuant to §4-205. Cf. Restatement (Second) of Conflict of Laws §387, comment h (1971); Nadelmann, Revision of Conflicts Provisions in the Bankruptcy Act, 1 Int. & Comp. L.Q. (4th Ser.) 484 (1952), 27 Ref. J. 53, 55 (1953)."

also 12 Collier, Bankruptcy, ¶ 119.02 (14th ed. 1975).

Second, Section 2a(22) and Rule 119 permit an American bankruptcy court to take jurisdiction of a proceeding involving the American assets of a foreign domiciliary, apply the American law to set aside preferential attachments, and then suspend the American proceeding and permit those assets to be administered in, or pursuant to, the foreign domiciliary proceeding. This theme runs repeatedly through Dr. Nadelmann's writings. As stated in Nadelmann, Bankruptcy in Canada : Assets in New York, 11 Am. J. Comp. L. 628, 629-30 (1962-63):

> "If the only purpose of the adjudication in the United States is voidance of a local preference, the double administration of assets, with double proof of claims and double distributions, may well be against the interests of all concerned. In such a case, under an amendment to the American Bankruptcy Act, in force since September 25, 1963, the bankruptcy court has power to suspend the exercise of its jurisdiction in view of the bankruptcy pending abroad. A finding that the local creditors will obtain their equal share in the foreign bankruptcy may lead to a suspension of the proceedings after the local assets have been turned over to the foreign trustee in bankruptcy." (footnote omitted).

Indeed, this was the very result reached in the old English case of Solomons v. Ross, 1 H. Bl. 131, note (1764) and the result Dr. Nadelmann in 1946 urged would be authorized were Congress to enact what it later did enact as §2a(22).

Nadelmann, Solomons v. Ross and International Bankruptcy Law, 9 Mod. L. Rev. 154 (1946); Nadelmann, Compositions - Reorganizations and Arrangements - In The Conflict of Laws, 61 Harv. L. Rev. 804, 838 (1948). For a similar result, reached under the American common law, see In re Stoddard, 242 N.Y. 148, 151 N.E. 159 (1926).

There is nothing in the record to indicate that a Chapter XI proceeding ancillary to the Swiss rehabilitation proceeding was not entirely feasible on May 5, 1975 when the American proceeding was filed. It was entirely feasible under the American law for the court to proceed under §2a(22) and Rule 119 to take jurisdiction, set aside the preferential attachments and then permit the assets here to be administered and distributed under the plan adopted in the Swiss proceeding. Were this approach adopted, no American disclosure of depositors would then be required in the American proceeding and it would be irrelevant that Finabank did not file a list of its depositors and could not make such disclosure. This disposes of any charge that Finabank acted in bad faith because it knew that a Chapter XI proceeding was impossible. It was not impossible at all, because approaches permitted under the Act were available under which such proceeding was entirely feasible. That the court later, as a matter of discretion, refused to utilize

such approaches does not, by hindsight, mean that one has acted in bad faith in seeking a contrary exercise of discretion.

Third, Section 2a(22) and Rule 119, in Dr. Nadelmann's view, also permit another approach to be adopted by the Bankruptcy Court that leads to the same result. A plan of arrangement could be adopted in the Swiss proceeding, and a coordinated, complementary plan could be adopted in the American proceeding. All depositors as well as other creditors could be notified of the American proceeding, and those who elected to appear in the American proceeding would participate here and be credited in the Swiss proceedings with amounts received here. See Nadelmann, The Recognition of American Arrangements Abroad, 90 U. Pa. L. Rev. 780, 797-98 (1942); Nadelmann, Compositions -- Reorganizations and Arrangements -- In The Conflict of Laws, 61 Harv. L. Rev. 804, 829 (1948). The practicality of this approach is indicated by the record in this case. Finabank reports assets of approximately 106,600,000 Swiss francs. (A 94-95) To this should be added some 22,318,000 Swiss francs ($8,732,000) in American assets to which title is disputed. (A 101-102). Of this total of 129,000,000 Swiss francs, the American assets amount to 31,200,000 Swiss francs (A 18)* or approximately

* An exchange of 2.556 Swiss francs per dollar is used for conversion in these figures.

24% of Finabank's total assets. Finabank's Chapter XI petition in fact names a large number of banks as general creditors (A 7) and of these, the claims of just three of these already filed or advanced in the American proceeding amount to over 33% of Finabank's total liabilities as reported to the court.* This amount is merely illustrative. Had the courts below permitted the proceeding to continue and not terminated it prematurely before these relevant facts could be shown, doubtless other of the named bank creditors would also have filed proofs of claim. This means that, on a pro-rata basis, the creditors already named by Finabank in its petition could receive all of the American assets and still get less than their pro-rata share of Finabank's total assets. Indeed, they would still have to go to Switzerland for more in order to share pro-rata. Accordingly, given the relative amount of American-situs assets, the unnamed depositors need not participate at all in the distribution of the American assets in order for all creditors to be treated on a pro-rata basis. Each of the depositors can easily be given actual written

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* The claim of First National Bank of Boston is $9,176,375. (A 16) The claim of Firestone (in Proof of Claim filed in the Bankruptcy Court on August 28, 1975) is $8,369,996. The claim of Investitions-Und Handels-Bank S.A. (in Complaint dated December 5, 1975 filed in the Bankruptcy Court on that date) is $4,380,937. The total of these is $21,925,000, or 56,000,000 Swiss francs. Total claims reported by Finabank are 187,000,000 Swiss francs (A 90-91).

notice through the Swiss Court (A 75-76) and himself elect whether to make a claim here. As Dr. Nadelmann suggests in The Recognition of American Arrangements Abroad, 90 U. Pa. L. Rev. 780, 797-98 (1942), those depositors not filing proofs of claim here could, in the American plan, in effect be treated as a separate class that would receive nothing.* And it should be kept clearly in mind that in the instant case, the problem was even simpler on May 5, 1975 because the "plan" Finabank was seeking to effect in the Swiss proceeding was a moratorium to be followed by payment in full -- making identification of depositors even more unnecessary.

Fourth, the international bankruptcy situation is one that Professor Kennedy (formerly Executive Director, Commission on Bankruptcy Laws of the United States) has characterized as "an area of special sensitivity and difficulty."** In dealing with such situations, § 2a(22) and Rule 119 call for flexibility in a genuine effort to achieve equity among all creditors.*** No one has ever really thought that a pro-

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* Under § 362 of the Act, creditors not filing proofs of claim are not counted in determining whether a majority in number and amount have accepted a plan.

** Kennedy, Forward, A Tribute to Stefan A. Riesenfeld : A Discussion of the Proposed Bankruptcy Acts, 63 Cal. L. Rev. 1427, 1431 (1975).

*** See Nadelmann, Compositions - Reorganizations and Arrangements -- In The Conflict Of Laws, 61 Harv. L. Rev. 804, at 835 (1948). Cf. Riesenfeld, The Status of Foreign Administrators of Insolvent Estates, 24 Am. J. of Comp. L. 288, 305-06 (Spr. 1976).

ceeding involving only the American-situs assets of a foreign domiciliary is simply an ordinary bankruptcy proceeding that either must proceed in the purely conventional way or be dismissed. For example, no one suggests that § 70a of the Act, which gives a trustee title to the bankrupt's assets wherever located, applies in such an ancillary proceeding.* Further, in such a proceeding, American preference laws will reach only a limited portion of the assets.** Indeed, the foreign law respecting preferences may well be more stringent than American law, thus producing more for creditors than would be produced by a purely American proceeding.*** The American proceeding is truly ancillary and, like the ancillary bankruptcy proceeding provided for in § 69(c) of the Act (but abolished in 1972 by Bankruptcy Rule 217), is not by any means expected to proceed as a full-scale independent proceeding.

In summary, again viewing the situation on

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* Nadelmann, The National Bankruptcy Act and the Conflict of Laws, 59 Harv. L. Rev. 1025, 1040-41 (1946); Nadelmann, Revisions of Conflict Provisions in the American Bankruptcy Law, 1 Int'l & Comp. L.Q. 484, 489 (1952).

** See In re Berthoud, 231 F. 529 (S.D.N.Y.), appeal dismissed, 238 F. 797 (2d Cir. 1916); Miller v. Wells Fargo Bank International Corp., No. 1071 (2d Cir. July 15, 1976, at p. 4987 of Slip Opinion).

*** Nadelmann, Concurrent Bankruptcies and Creditor Equality in the Americas, 96 U. Pa. L. Rev. 171, 172 (1946-48).

May 5, 1975, an American Chapter XI proceeding was entirely feasible in the light of the intent of § 2a(22) and Rule 119 and the flexibility they afford and mandate in the international bankruptcy situation. It is not necessary, and often is not appropriate, for the American proceeding to go beyond the stage of setting aside preferential transfers. In that case, the need for identification of depositors is non-existent. But even if further American administration is deemed necessary, a plan for Finabank would be entirely feasible in coordination with a Swiss plan. Reading the Act as a whole -- giving full weight to the intent of, and policy behind, § 2a(22) and Rule 119 and the flexible procedures they afford -- the Bankruptcy Act should not be construed to authorize dismissal on a purely theoretical ground when, in fact, the American proceeding was entirely feasible and is essential to prevent preferences and secure equality among creditors. Above all, in view of the ability of the bankruptcy court in its discretion to adopt procedures that make the identification of depositors unnecessary, it is wholly unjustified to conclude that Finabank's seeking such relief was in bad faith.

Equality among creditors -- the basic underlying purpose of the whole Act -- calls for a recognition of the special problems presented in the international bankruptcy situation and for a flexibile exercise of authority in dealing with them.

POINT III

The Fact That American Creditors Benefit By The Dismissal Is No Justification Whatever For The Dismissal

Again, Dr. Nadelmann in his writings has categorically made the point that one principle clearly embodied in the American Bankruptcy Act is that it does not sanction any discrimination in favor of American creditors vis-a-vis foreign creditors. Nadelmann, Foreign and Domestic Creditors in Bankruptcy Proceedings. Remnants of Discrimination, 91 U. Pa. L. Rev. 601, 606, 608 (1943); Nadelmann, Legal Treatment of Foreign and Domestic Creditors, 11 Law & Contemp. Prob., 696, 698-99 (1946). See also McLaughlin Book Review, 50 Harv. L. Rev. 379, 380 (1936).

Indeed, in his seminal 1946 article in 59 Harvard Law Review, supra, Dr. Nadelmann expressed the view that one section of the Act, § 65d, did have the potential for just such discrimination. 59 Harv. L. Rev. at 1049-50. Congress thereafter in 1952, amended § 65d to meet Dr. Nadelmann's objections, and he is given credit for the amendment. (Footnote, p. 18 above).

By quoting from Disconto Gesellschaft v. Umbreit, 208 U. S. 570 (1908), however, the courts below appear to suggest that the Supreme Court has construed the Act as

sanctioning such discrimination. The very fact that both courts relied on Disconto indicates that both entirely misconceived the requirements of the Bankruptcy Act. The Supreme Court in Disconto was applying the state common law rule that local attachments would prevail against a receiver appointed in another state.* The Bankruptcy Act did not adopt that common law rule, and the Supreme Court's decision in Disconto is no authority whatever as respects the Bankruptcy Act.** In Israel-British Bank (London) Ltd. v. FDIC, 536 F.2d 509, 515 n.3 (2d Cir. 1976) this Court rejected as misplaced a similar effort to cite prior Supreme Court cases involving the state common law rule as authority for interpretation of the Bankruptcy Act. The Bankruptcy Act simply does not sanction any preferential treatment for Americans. As this Court said in the Israel-British Bank case, supra at 513, the "theme of the Bankruptcy Act is equality of distribution of assets among creditors . . . and correlatively avoidance of preference to some." Moreover, the phrasing of that opinion appears to recognize that it is equitable treatment of all creditors, not merely American creditors, that is intended.

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* See Nadelmann, Foreign and Domestic Creditors in Bankruptcy Proceedings. Remnants of Discriminations, 91 U.Pa. L. Rev. 601, 604-605, 608; Nadelmann, The National Bankruptcy Act and the Conflict of Laws, 59 Harv. L. Rev. 1046-47, 1048 n.123 (1946).

** Id.

The Bankruptcy Court below referred to Rule 119 as "permissive" and as affording it the "option" to dismiss and, without even considering the criteria set forth in Rule 119, said that it "chooses" to dismiss. (A 232) The District Court below, in affirming, advanced as support for its holding the words in Rule 119 respecting the "rights and convenience of local creditors." (A 281) Neither court made any effort to explore the purpose or meaning of Rule 119 and the District Court concluded that since no American creditors will lose, and two will gain, by a dismissal, "the claims of local creditors appear best protected by dismissal of the case." (A 283) Aside from the fact that the Act and Rule intend no such narrowly provincial result, this conclusion by the court below is a play on words "local" and "rights and convenience."

First of all, "rights and convenience" do not mean preferential or favorably discriminatory treatment. As concerns "rights," the question is whether the "local" creditor will be deprived of a right to equal and fair treatment by being relegated to the foreign proceeding, and not whether dismissal will afford him extra, preferential "rights."* As Dr. Nadelmann has said, "'Local interest,'

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* Nadelmann, The National Bankruptcy Act and the Conflict of Laws, 59 Harv. L. Rev., 1025, 1041 (1946); Nadelmann, Assumption of Bankruptcy Jurisdiction Over Non-Residents, 41 Tul. L. Rev. 75, 77-78 (1966-67).

[is] not to be confused with a desire on the part of a local creditor to obtain more than the other creditors. . . ."* And it rings hollow for major international banks carrying on active business abroad with a Swiss bank with full knowledge of Swiss bank secrecy now to seek preferential treatment on some claimed inequity inherent in that secrecy.

"Convenience" refers to the necessity of the creditor to go abroad (or hire counsel abroad) to make a claim in a foreign proceeding or otherwise participate in that proceeding. Cf. In re Stoddard, 242 N.Y. 148, 168, 151 N.E. 159, 166 (1926). In the instant case, any talk about that kind of convenience to the attaching American creditors is frivolous. These attachers are two international banks with worldwide operations. Their contracts here involved were made by their European branches (in Paris and Milan (A 7)) with a Swiss bank. It is a misuse of § 2a(22) and Rule 119 to use it to justify preferences to them on the basis that New York is a more "convenient" place for them to prosecute their claims for collection upon those contracts.

On a more general basis, as Dr. Nadelmann observed in Solomons v. Ross and International Bankruptcy Law, 9 Mod. L. Rev. 154, 164 (1946):

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* Nadelmann, Compositions -- Reorganizations and Arrangements -- In the Conflict of Laws, 61 Harv. L. Rev. 829 (1948).

> "The argument that proof of the claim in a foreign, possibly distant, country may incur trouble and expense is losing much of its importance with shrinking distances. Proof abroad is always necessary when the distribution abroad promises a higher dividend than is attainable by relying on the local assets. Often proof abroad will be less troublesome than engaging in local proceedings which, eventually, may not dispense with the necessity to prove abroad."

For the same reasons, it is equally unsound even to give the term "local" any significance here. The transactions here were not New York, or even American transactions. As was said in a similar context long ago in Steingut v. Guaranty Trust Co. of New York, 58 F. Supp. 623, 634 (S.D.N.Y. 1944), modified, 161 F.2d 571 (2d Cir.), cert. dismissed, 332 U.S. 753, cert. denied, 332 U.S. 807 (1947):

> "It should be noted that here we have no local creditors in the sense of creditors who did business with a local office of Russo-Asiatic, since Russo-Asiatic . . . never did business in New York or in the United States."

"Local" has sometimes been used in the bankruptcy context to refer to place of payment* (in which case, Firestone was "local" since it was to be paid in New York) or place of incurrence.** But whatever it means, the happenstance of

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* Nadelmann, Creditor Equality in Inter-State Bankruptcies : A Requisite of Uniformity in the Regulation of Bankruptcy, 98 U. Pa. L. Rev. 41, 47 (1949-50).

** Id. at 51.

American citizenship of major international banks claiming on obligations entered into abroad with a Swiss bank cannot properly be a basis for according favored treatment to the attachers here even if such treatment were sanctioned by the Act -- which it categorically is not. The inappropriateness of the contrary position is illustrated by the fact that only the difference between the American character of Firestone and the attaching banks is that Firestone was conducting its European business through a subsidiary while the attaching banks were utilizing branches. The loss in either case falls equally on Americans.

Section 2a(22) and related Rule 119 were never intended to furnish an instrument to favor American creditors by aiding them in obtaining or retaining a priority or preference. As Professor Kennedy said shortly after the enactment of § 2a(22):

> "The premise of this new provision is that it may be most consistent with justice and fairness to permit a foreign bankruptcy proceeding to administer an estate in its entirety, including property located in this country.
>
> * * *
>
> Discretion is vested in the American bankruptcy court by the amendment to 'exercise, withhold, or suspend the exercise of jurisdiction,' temporarily or indefinitely, in the light of all the relevant circumstances, including the rights and convenience of local creditors. Local administration may be necessary to accomplish

> avoidance of preferential transfers or to enable local creditors to attain equality with foreign creditors.
>
> Hopefully the lawmakers of other countries will be encouraged to follow the example of the United States in providing a basis for the exercise of judicial discretion in respect to the question whether a second administration of a bankrupt estate located in two or more jurisdictions should be undertaken. Ideally, assumption of concurrent jurisdiction will then depend on the outcome of an inquiry into whether it will contribute to efficient administration and the desideratum of achieving equality in the handling of the bankrupt's estate as a whole."

Kennedy, Bankruptcy Legislation of 1962, 4 B. C. Ind. & Com. L. Rev. 241, 246-47, 248 (1963).

To employ § 2a(22) and its implementing Rule 119 as a basis for justifying favorably discriminatory and unequal treatment to "Americans" flies squarely in the face of what all understood they were intended to accomplish.

POINT IV

The Dismissal Here Was Not Made Under § 376 and Rule 11-42 And Could Not Properly Be Made Under § 376 and Rule 11-42

The Bankruptcy Court did not purport to dismiss under § 376 of the Bankruptcy Act and related Rule 11-42, although it did observe that Finabank's default in later failing to file a plan after filing its petition fell squarely within Rule 11-42(b). (A 229) The District Court seemed, however, to attach significance to that finding. (A 280) Both courts relied upon post-petition statements of counsel for Finabank that, as time went by, the prospects of rehabilitation were looking less likely. (A 226-27, 279). These post-petition defaults and diminishing prospects are, however, pertinent only with respect to § 376 and Rule 11-42.

Section 376 and Rule 11-42 provide for dealing with defaults or failures occurring after a Chapter XI proceeding is filed. As the Advisory Committee Note to Rule 11-42 indicates, this includes such defaults as failure to file schedules or propose a plan. Under § 376 and Rule 11-42, such defaults do not permit an automatic dismissal as occurred here. The Bankruptcy Court may dismiss under § 376 and Rule 11-42 only following a hearing upon notice

to creditors.* No such hearing (or notice) took place in the instant case.** More importantly, while § 376 and Rule 11-42 authorize the court either to dismiss or to adjudicate the debtor bankrupt, the choice is not to be made on whim. It is a matter of sound discretion governed by specific criteria set forth in the Act and Rule. Section 376 requires that the court be governed by its findings of what is "in the best interest of creditors," and Rule 11-42 similarly requires that the action be based on a finding of what is in the "best interest of the estate," which, according to the Advisory Committee Note to the Rule, means "whichever is in the interest of the debtor and creditors."

Patently, the courts below in this case made no finding whatever as to the "best interest" of creditors or of the estate -- except to find that it was obviously in the best interest of the two American attaching creditors that they be permitted to retain their preferences and thereby be

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* In the case of an original Chapter XI petition, as occurred here, the debtor is entitled to an adjudication as of right and without a hearing if he requests it. Rule 11-42(a).

** It seems clear that § 376 and Rule 11-42 contemplate a notice of a hearing to be held under that Section and Rule, not merely a notice of a First Meeting of Creditors at which a motion to dismiss will be heard -- particularly where that motion did not purport to seek relief under § 376 and Rule 11-42 (A 13-26).

paid in full.* "Creditors" is defined in § 307(1) of Chapter XI of the Act to "include the holders of all unsecured debts, demands, or claims of whatever character against a debtor." It is submitted that § 376 and Rule 11-42 require that the decision be made taking into account the best interest of all creditors, not just creditors with preferential attachments or "American" creditors.

The interest of all creditors must be weighed and Finabank's interests as well. 9 Collier, Bankruptcy ¶ 10.04[2] (14th ed., 1976 revision); Id. Vol. 8, ¶4.21[8]. See Goodrich v. England, 262 F.2d 298, 302-303 (9th Cir. 1958); In re Bush Terminal Co., 84 F.2d 984, 985-86 (2d Cir.), cert. denied, 399 U.S. 596 (1936).

Clearly, no finding was made below (and none could be justified by the record) that dismissal, rather than adjudication, was in the best interest of Finabank's creditors or the Finabank estate. Without such a finding -- expressly required by the statute and Rule -- dismissal under § 376 and Rule 11-42 was impermissible. Deferral by an appellate court to discretionary conclusions of the lower court can-

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* Even then, as the District Court noted, it had to disregard the claim for $138,000 of another American who did not attach, First National City Bank. It characterized this as "relatively minor." (A 282) No authority was cited to suggest that the "relative" size of a claim of $138,000 justifies ignoring it in favor of larger claims.

not be justified where the mandated criteria for the exercise of that discretion have been ignored and the mandated hearing after notice not held.

CONCLUSION

It is respectfully submitted that the opinions below of both courts reflect two basic reasons for the result reached. One is an intolerance of Swiss bank secrecy and a refusal to consider the fact that, notwithstanding that secrecy, equality among creditors can be advanced by an American Chapter XI proceeding that is entirely feasible within the flexible framework intended by § 2a(22) and Rule 119. The second consideration that the opinions below reflect is an attitude that the "Americans" have got theirs and the foreigners may take the hindmost. This attitude is directly contrary to the intent of the Bankruptcy Act and is conducive to retaliatory treatment, rather than comity and reciprocity, when American creditors are involved in foreign proceedings.* It is both bad policy and bad law. As the Supreme Court long ago observed, the "true spirit of international comity" requires some effort to recognize arrangements effected by the domicile of a corporate bankrupt.

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* Howard, United States Bankruptcy Jurisdiction over Unregulated Foreign Banks, 17 Harv. Int'l L.J. 359, 376 (Spr. 1976).

Canada Southern Railway Co. v. Gebhard, 109, U.S. 527, 539 (1883). And as Dr. Nadelmann pointed out in The Recognition of American Arrangements Abroad, 90 U.Pa. L. Rev. 780, 807 (1942), the desirable goal of reciprocity in international bankruptcies would be best induced by American law taking the first step.

The decision below should be reversed and the Bankruptcy Court should be directed to proceed under § 376 and Rule 11-42, with a hearing after notice, to make a determination whether, by reason of the post-petition defaults of Finabank, the proceeding should be dismissed or Finabank adjudicated bankrupt in the best interest of all creditors and the Finabank estate. If that decision is that Finabank should be adjudicated a bankrupt, the Bankruptcy Court may then, as matters progress, employ the criteria of Rule 119 to determine whether to proceed with local administration or to suspend the proceeding and allow the assets to be administered in the Swiss proceeding.

Respectfully submitted,

CLEARY, GOTTLIEB, STEEN & HAMILTON
Attorneys for Firestone Tire
& Rubber Company
Office and P.O. Address
One State Street Plaza
New York, New York 10004
Telephone: 344-0600

JAMES C. BLAIR,

Of Counsel

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ATTY'S FOR First Natl Bank of Boston

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